Galleria Joint Venture *and* International Ladies' Garment Workers' Union Ohio District Council a/w International Ladies' Garment Workers' Union, AFL–CIO

St. Clair Management Co. *and* International Ladies' Garment Workers' Union Ohio District Council a/w International Ladies' Garment Workers' Union, AFL–CIO. Cases 8–CA–22469 and 8–CA–22571

July 17, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

In this proceeding we consider the impact of the Supreme Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), on a shopping center owner's right to exclude from its private property nonemployee union representatives distributing handbills informing the consuming public of a strike because of alleged unfair labor practices committed by a tenant of the shopping center. The specific issue before us is whether Respondent Galleria Joint Venture—the shopping center owner—and Respondent St. Clair Management Co.—the shopping center operator—violated Section 8(a)(1) by prohibiting the conduct of this handbilling in front of the Laurel store, which is one of the retail stores in the Galleria, an enclosed shopping mall in downtown Cleveland. Pursuant to our analysis below, we conclude that the Respondents did not violate the Act as alleged.

A. *Procedural Background*

On December 6, 1990, Administrative Law Judge Bernard Ries issued the attached decision in this case, in which he applied the framework for analysis set forth in *Jean Country*, 291 NLRB 11 (1988), for issues involving denial of nonemployee access to private property, and found that the Respondents had violated the Act. The Respondents filed exceptions to the judge's finding of a violation.

On July 22, 1991, the Board issued a Decision and Order in this case, *Galleria I*, 303 NLRB 815, affirming the judge's findings and conclusions.[1] Thereafter, the Respondents filed a petition for review of the Board's Decision and Order in the United States Court of Appeals for the Sixth Circuit, and the Board filed a cross-application for enforcement of its Order.

On January 27, 1992, the Supreme Court issued its opinion in *Lechmere*, holding that the Board's balancing test in *Jean Country*, as applied to the nonemployee union organizers in that case, was inconsistent with controlling Supreme Court precedent. Thereafter, the Board and the Respondents filed a joint motion with the court of appeals to withdraw without prejudice the Respondents' petition for review and the Board's cross-application for enforcement, and to remand the case to the Board for further consideration in light of *Lechmere*. The joint motion was granted, and the Board notified the parties that they could submit statements of position to the Board on the issues raised by the Board's reconsideration of the case. Subsequently, statements of position were filed by the General Counsel, the Respondents, and the Union.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon reconsideration of *Galleria I* in light of *Lechmere*, the statements of position of the parties, and our recent decision in *Leslie Homes, Inc.*, 316 NLRB 123 (1995), we have decided to vacate the Decision and Order at 303 NLRB 815 and to dismiss the complaint in its entirety.

B. *Facts*

The facts, fully set forth in the attached judge's decision, are essentially as follows. The Galleria in downtown Cleveland has approximately 50 retail stores set on two levels; there is also a ''food court'' providing several places to obtain refreshments. All four sides of the mall are bordered by a red-brick sidewalk. This sidewalk covers both the perimeter of Respondent Galleria's private property and part of the public property adjoining the mall. There are five means of entry to the mall from public property: The East 9th Street door, considered the formal mall entrance; the St. Clair Avenue entrance; the food court entrance; the entrance to a parking lot located underneath the mall, which entrance appears to be a city block away from the mall; and the entrance to a 40-story office building adjoining the mall, through whose ground-floor foyer one may enter the mall itself. From the underground parking lot, one ascends to the two-level shopping area by means of an escalator in the center of the mall. Those who work or otherwise have business in the adjoining office building may enter the mall from the building without first stepping onto public property.

The Laurel store is on the Galleria's ground level. The record establishes that it is about 80 feet from the East 9th Street entrance. Escada U.S.A., Inc. owns the Laurel store and leases the space it occupies in the mall. The store sells only those clothes imported by Escada.

[1] Additionally, the Board adopted, in the absence of exceptions, the judge's dismissal of allegations concerning the Respondent's interference with the handbilling on public property outside the Galleria. Also, the Board modified the judge's Order with regard to the location of the handbilling permissible within the mall, pursuant to an exception filed by the Union.

Escada has a warehouse distribution center in New Jersey where, in November 1989, employees engaged in a strike after unfair labor practices were assertedly committed in reaction to an organizing drive by the Union at that location. At about the time the strike began, the Union attempted to handbill potential customers of the Laurel store in the Galleria. The handbills informed readers about the strike in the New Jersey distribution center and of Escada's alleged unlawful conduct, and asked that they not purchase Escada merchandise. The two handbillers—who were not employees of either of the Respondents or of Escada—stood in front of the store, on private property inside the mall. They were immediately ejected by the Respondents' security employees. When the two subsequently attempted to distribute the handbills outside the mall, the Respondents had them removed entirely from the red-brick sidewalk, a portion of which constituted public, rather than private, property.[2]

In early January 1990, the Union again tried to distribute its handbills in front of the Laurel store within the mall, and again the two handbillers were ejected. Subsequently, the Union and Respondent St. Clair reached an informal accommodation, and the handbilling, which was at all times peaceful and nondisruptive, was permitted in front of the store from about mid-January until mid-February. At that time the Respondents' permission was withdrawn. The Union then handbilled at public-property locations near three of the entrances to the mall, including the East 9th Street entrance, until mid-March, when it decided to terminate the activity.

C. *The Supreme Court's Opinion in Lechmere*

In *Lechmere, Inc. v. NLRB*, supra, the Supreme Court held that *Jean Country* impermissibly recast as a ''multi-factor balancing test'' the general rule of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. 502 U.S. at 538. *Babcock's* holding, as affirmed in *Lechmere*, is that Section 7 does not allow nonemployee union organizers to come onto private property except in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'' Id. at 537. Thus, ''[i]t is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights.'' Id. at 538 (emphasis in original).

D. *The Parties' Contentions*

The General Counsel concedes that the Supreme Court's standard in *Lechmere*, which was applied to nonemployee union organizers attempting to communicate with employees on private property, is applicable in the instant case, in which nonemployee union representatives sought to distribute handbills to consumers informing them of the strike and Escada's alleged unfair labor practices. The General Counsel further concedes that under the *Lechmere* standard the complaint must be dismissed because the heavy burden to demonstrate the absence of feasible alternatives to trespass has not been satisfied here. Thus, the General Counsel observes that picketing on public property was available for the Union to communicate its message, and there is no showing that it was not feasible. In addition, he notes that the handbilling in which the Union engaged on the public property at the perimeter of the Galleria was not shown to be either unsafe or an unreasonable alternative under *Lechmere*. With regard to the potential enmeshing of neutrals, a factor relied on in granting access in *Galleria I*, the General Counsel points out that the handbills used in this case clearly identified the Laurel store as the focus of the Union's boycott, making it unlikely that the public would perceive that other stores were involved in the dispute. He also suggests that, in any event, it is more appropriate for the neutrals to raise this issue with the property owner than for a union to take it into consideration in assessing the feasibility of alternatives to trespass.

The Respondents argue that the exceptional situation permitting access, as set forth in *Lechmere*, may come about only where nonemployee union representatives are attempting to communicate with *employees* on private property, and *not customers*, citing the 9th Circuit's post-*Lechmere* view in *John Ascuaga's Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992). Accordingly, the Respondents urge that the Board dismiss the complaint given the identity of the Union's intended audience here. Alternatively, they contend that even if the *Lechmere* exception were available to the Union on a proper showing of absence of alternative means of communication, this burden has not been met. Thus, the Respondents argue that the Union was able to distribute its handbills on the public property near the entrances to the Galleria, and it might also have communicated its message through billboards, radio, or newspapers.

The Union contends that the application of the Supreme Court's decision in *Lechmere* is limited to scenarios in which nonemployee union representatives are seeking to organize employees who work on private property. In private-property access cases in which other Section 7 rights are being exercised—such as here, where the union handbillers acted on behalf of

[2] As indicated above, the judge dismissed allegations that the Respondents unlawfully ejected the handbillers from *public* property in this instance, and the Board adopted the dismissal in the absence of exceptions.

striking *Escada* employees—it argues that the Board's *Jean Country* standard continues to apply. Alternatively, the Union argues that even if the *Lechmere* standard is applied here, reasonable alternatives to trespass were not available. The Union contends that under either analysis the Board's Order in *Galleria I* should be affirmed.

E. *Discussion*

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee area standards activity. After reviewing *Lechmere* and related Court precedent,[3] the Board concluded that the Court intended the *Babcock* accommodation analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployees from gaining access to its private property to engage in area standards activities. No balancing of employee rights and property rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the private property where the employer is located. For the reasons fully set forth in *Leslie*, we find that the *Babcock* accommodation analysis, and the general rule articulated above, also apply to the Section 7 activity in the instant case—nonemployee distribution of handbills to the consuming public, protesting alleged unfair labor practices occurring at another location and informing the public of a strike in that regard.[4]

We turn then to the question of whether the General Counsel has proven that the Union had no reasonable alternative means of communicating with the Laurel store's customers.[5] In *Lechmere*, the Court stated that the *Babcock* exception permitting access to private property by nonemployee organizers applied only in rare situations in which a union confronts ''unique obstacles'' to nontrespassory communications, as when the location of a plant and the living quarters of employees ''isolated [them] from the ordinary flow of information that characterizes our society.'' 502 U.S. at 540. The Court emphasized that the burden of proving the exception is a heavy one, which cannot be satisfied ''by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.'' Id.

Overall, the evidence on this record—compiled pursuant to the *Jean Country* standard and prior to *Lechmere*—does not satisfy the burden explained in *Lechmere* and applied in *Leslie*.[6] Merely as a matter of observation, we agree with the General Counsel that no evidence was submitted to show that consumer picketing on the public-property sidewalk at the perimeter of the Galleria—in lieu of or in addition to public property handbilling—would have been an unreasonable alternative to the Union's trespassory activity in front of the Laurel store. See *Leslie*, slip op. at 8.[7] Similarly, we observe that no evidence was submitted to establish that massmedia communication of the Union's message was not a reasonable alternative to trespass within the Court's view of the reasonableness concept in *Lechmere*. See *Oakland Mall*, 316 NLRB 1160, 1163 (1995), where the Board based its dismissal of 8(a)(1) allegations in a trespassory access case on the failure to show that massmedia communication was not a reasonable alternative to trespass for secondary consumer boycott handbilling.

More particularly, we conclude that the General Counsel has failed to provide adequate evidentiary support for the essential theory of a violation in this case. The General Counsel originally contended, and the Board agreed in *Galleria I*, that the Union was unable to communicate an effective message from the public-property sidewalk outside the Galleria because of the nature and configuration of the mall itself. Thus, it was noted that the Laurel store was one of at least 50 commercial enterprises in a bilevel mall, that the mall had five different entrances from public property, and most significantly, that consumers could enter the mall through interior, private-property entrances from the adjoining 40-story office building and from the underground parking lot without first crossing public property. Primarily in light of these physical factors, it was found under the nowrejected *Jean Country* standard that limiting the Union's conveyance of its message to the public-property sidewalk would so dilute and diminish the Union's ability to communicate with potential patrons of the Laurel store as to make it an unreasonable alternative to trespass. *Galleria I*, 303 NLRB 815 fn. 1.

While it may be open to the General Counsel to satisfy the inaccessibility exception of *Lechmere* by showing inability to reach mall patrons owing to par-

[3] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. Carpenters San Diego County District Council*, 436 U.S. 180, 206 (1978).

[4] Accordingly, we do not rely on the judge's assessment of the relative strengths of the Sec. 7 and property rights asserted by the parties.

[5] As in *Leslie* we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for the Sec. 7 activity here, if it can be proved that the Laurel store's customers are not reasonably accessible by nontrespassory methods. Cf. *John Ascuaga's Nugget v. NLRB*, supra, where the Ninth Circuit found that the inaccessibility exception to the rule that an employer need not accommodate nonemployee organizers does not apply to attempts to communicate with the general public.

[6] No party has requested that this proceeding be remanded, in light of the potential impact of *Lechmere*, to reopen the record for additional evidence concerning alternative means.

[7] There is no question here that the Laurel store, owned and operated by Escada, is a ''primary'' rather than a ''neutral'' or ''secondary'' employer, and thus no risk that such picketing, properly directed against Escada and the Laurel store, would be prohibited by Sec. 8(b)(4)(B). See *Leslie*, fn. 21.

ticular details of a mall's configuration, it has not carried that burden here.[8] Among other things, the General Counsel did not produce evidence showing roughly what proportion of the total number of mall patrons enter through the formal entrance adjoining public property,[9] as opposed to those entering through passageways from the privately owned office building and covered parking lot. In sum, there is inadequate record evidence that alternative means which would not require trespass on private property were absent. Accordingly, we dismiss the complaint on the insufficiency of the evidence. See, e.g., *Loews L'Enfant Plaza Hotel*, 316 NLRB 1111 (1995).[10]

ORDER

The Board's Order at 303 NLRB 815 is vacated, and the complaint is dismissed.

CHAIRMAN GOULD, concurring.

I join in the dismissal of the complaint in this case. See my additional comments set forth in my concurring opinion in *Leslie Homes*, 316 NLRB 123 (1995).

[8] We see no inconsistency between our finding in *Galleria I* and our finding here. In *Galleria I*, the Board considered reasonable alternatives as one part of its *Jean Country* test. In light of *Lechmere*, we now consider that factor as a critical one, and we place a heavy burden on the union to show the absence of reasonable alternatives. The burden has not been met.

[9] This entrance, on East 9th Street, was located 80 feet from the Laurel store. The Union had done some of its handbilling on the public property next to this entrance.

As noted above, the judge dismissed allegations that the Respondents interfered with handbilling on public property, and no exceptions were filed in this respect. This dismissal was based on the fact that the Respondents, on isolated occasions, mistook the public property for private property. We note, as did the judge, that the Union and the Respondents resolved the confusion by identifying where the public-property segment of the redbrick sidewalk outside the Galleria was located, and that the Union subsequently handbilled from this public property.

[10] In *Galleria I*, the judge, with the Board's approval, relied in part on the factor of ''enmeshing neutrals'' in finding that the Union's handbilling from the public-property sidewalk was an unreasonable alternative. In our present disposition of this case, we note that the Board in *Jean Country* pointed out that the enmeshment of neutrals was not a basis, per se, for allowing trespassory access. 291 NLRB 11 at fns. 8 and 19. Certainly this view is at least as valid post-*Lechmere* as it was before. Accordingly, in view of the failure to otherwise satisfy the alternative-means burden, we need not further address the ''enmeshment'' issue here. Also see *Loehmann's Plaza*, 316 NLRB at 1111 (1995), where the Board found that area standards picketing, properly conducted, would not have enmeshed neutral employers.

Nancy Recko, Esq., for the General Counsel.
T. Merritt Bumpass Jr., Esq. and *Carl H. Gluek, Esq. (Thompson, Hine & Flory)*, of Cleveland, Ohio, for the Respondents.
Frank Consolo, Esq. (Schwarzwald, Robiner & Rock), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. This matter was tried in Cleveland, Ohio, on August 20–22, 1990.[1] The complaint essentially raises the issue of the extent to which, in the particular circumstances, property rights must yield to the exercise of rights protected by Section 7 of the National Labor Relations Act. Respondents deny all material allegations of the complaint that assert violations of the Act.

Briefs were received from all parties on or about November 2, 1990 (all dates refer to 1990 unless otherwise indicated). I have considered the transcript of proceedings,[2] the exhibits, and the briefs, and I have reached the following

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

I. THE BASIC FACTS

Respondent Galleria Joint Venture (GJV) owns an enclosed shopping mall in downtown Cleveland, Ohio, which is operated by Respondent St. Clair Management Company. The Galleria mall apparently contains about 50 stores on two floors, a refreshments area on the first floor, and some open spaces which are occasionally used for exhibits. It is open 7 days a week.

The mall is a modern day analogue of the old-fashioned downtown shopping area. It is surrounded on three sides by streets and sidewalks commonly used by vehicular and pedestrian traffic and on the fourth by a walkway which is owned by GJV and bounded by three other buildings. Each of the four sides of the mall is bordered by a red brick sidewalk which, according to the testimony, covers both the boundaries of GJV's property and part of the public property which adjoins it.

The mall has several entrances, the most formal being the one on the west side facing East 9th Street. It may also be entered from the south on the St. Clair Avenue side, from the east through the lobby of an adjoining 40-story office building owned by GJV, through the food court entrance on the northwest, and from a parking garage beneath the ground floor.

A manual for security guards issued by Respondents states that the ''placing or distribution of written materials and the solicitation of customers or employees inside the mall and common areas is prohibited, no matter what its purpose or sponsorship.'' A similar rule applies to distribution and solicitation in the mall ''parking lots or roadways.'' While the manual also states that express rules to this effect ''are to be posted at all entrances,'' such posting has not been accomplished. Commercial solicitors have consistently been ordered to leave the mall.

The premises in the mall have seldom been used for other than business-related purposes. Occasional art and automobile exhibitions are permitted, but no people are there to promote the exhibits. Galleria Marketing Manager Elizabeth Umstead testified that she has, without deviation, refused to

[1] The charges in these cases were filed, respectively, on February 20, 1990, and March 21, 1990. The complaint issued on April 30, 1990.

[2] Certain errors in the transcript are noted and corrected.

grant permission to tenants who wish to distribute promotional leaflets on the property. The only actual solicitation that has been allowed was for one emergency relief situation and by the Salvation Army during the Christmas season. Even for the latter purpose, Respondents have created—on paper, at least—a landlord-tenant relationship, by executing a ''lease'' under which the the Salvation Army is allowed to operate a ''manned collection kettle'' in a small space for a month,[3] in exchange for the Army's agreement to provide appropriate entertainment, such as ''carolers and mini bands.'' At some recent time, a demonstration involving a professor at a local university assembled outside the mall, but on its property, for about an hour, and no effort was made to remove the demonstrators.

The underlying labor dispute here concerns a firm called Escada U.S.A., Inc., which imports clothes from Europe to its distribution center in New Jersey and sells them in this country under the label of ''Escada'' or ''Laurel'' or (apparently) ''Crisca,'' either from outlets called ''Escada'' or ''Laurel'' or through sale to other stores (several of which are in the Cleveland area). In this case, there is a store called ''Laurel'' in the Galleria which is owned by Escada and which markets only Escada and Laurel brand clothes.

Albert Gargiulo, the Ohio state director of the ILGWU, received a call in November 1989 from the New York office of the ILGWU, in which he was told that the employees of the New Jersey Escada facility were on strike in protest against the discharge of an employee-organizer.[4] Gargiulo was asked to handbill the Laurel store at the Galleria; he agreed to do so, and soon received some leaflets from New York, which he promptly had duplicated.

Toward the end of November, Gargiulo and Barbara Janis, another union employee, entered the Galleria and stood a few feet outside the 26-foot front of the Laurel store and, in a peaceful manner, handed out to prospective Laurel customers two leaflets signed by ''The Escada Workers' Strike Committee, Local 138, International Ladies' Garment Workers' Union.'' One leaflet read:

> BUYERS BEWARE:
> ESCADA ON STRIKE
> On November 8, the workers at Escada (USA), Inc.'s New Jersey warehouse—the company's only distribution center in the United States—walked off their jobs to protest the management's ILLEGAL FIRING of a pro-union employee and its subsequent attempts to intimidate union supporters. The workers' action has successfully shut down Escada's U.S. importing operation.
> DON'T PATRONIZE A COMPANY WHICH CANNOT DELIVER ITS MERCHANDISE!
> DON'T BUY ESCADA, LAUREL, AND CRISCA!

The second leaflet also appealed to customers not to purchase garments bearing the Escada, Laurel, and Crisca labels; assailed the parsimony of Escada, Inc.; and charged that when the employees began to organize, Escada ''began to fire us.'' Galleria customers were asked not to ''support a lawbreaker.''

A few minutes after arriving, the two union agents were told by security guards to leave. They took their handbills outside the Ninth Street entrance, but were again told to leave the red brick path. The record indicates that not all that path in fact underlies GJV property; some of it is public. Apparently because the placement indicated by the security guard made distribution of the handbills difficult, Gargiulo and Janis left. They made another attempt in November, handing out leaflets outside the mall, but were told to leave and did so. The record is incomplete on the details of this sortie.

On January 11, Gargiulo and Janis made another attempt, this time back inside the mall and in front of the Laurel store. When they were told to leave by the assistant security manager, they did so. Janis and another union representative stationed themselves at the two ends of East Ninth Street, off the red brick, but soon left.

On January 22, the Union's attorney wrote to Respondent St. Clair, threatening to file a charge with the Board unless agreement could be reached allowing the handbillers to locate themselves outside the Laurel store in the mall. St. Clair's response was affirmative, and the Union engaged handbillers to stand, two at a time, outside the Laurel door. The handbilling began on January 24 and ended on February 19, after St. Clair announced that it had changed its mind. During this time, the handbilling had been orderly and without incident. The Union promptly filed a charge. After their removal, handbillers were stationed at the entrances at Ninth and Twelfth Street and St. Clair Avenue until March 17, when the Union decided that it could not get its message across from those locations.

II. FINDINGS AND CONCLUSIONS

The complaint alleges that Respondents violated Section 8(a)(1) by refusing to allow the Union to handbill both inside the Galleria and on public sidewalks outside.

The principles controlling this decision were announced in *Jean Country*, 291 NLRB 11 (1988), in which the Board modified to some extent its existing method of analyzing the right of strangers to enter on an employer's property to engage in activity protected by Section 7 of the Act. In a effort to clarify what has since been called ''this murky corner of the law,'' *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 319 (1st Cir. 1990), the *Jean Country* Board decided that the proper test would require balancing the strength of the Section 7 claim against the strength of the property right involved, taking into account in each case ''the availability of reasonable alternative means'' for the exercise of the Section 7 right short of trespass.

As the Board stated in *Jean Country*, ''[T]here is no simple formula that will immediately determine the result in every case.'' It has, however, attempted to provide guidance by listing some factors which may be relevant to the assessment of the weight of the various rights. As to property rights, it suggests considering ''the use to which the property is put, the restrictions, if any, that are imposed on public ac-

[3] Provision is made that ''Tenant expressly agrees that it will not ring a bell in connection with operating the collection kettle.'' The spirit of Christmas grows dimmer.

[4] This is, clearly, hearsay, and it was objected to. I overruled the objection. I think that in a consumer boycott case such as this one, it is sufficient to prove a good-faith belief that protected activity is occurring at the distant location. In any event, the record shows a stipulation by the parties that Local 138 of the ILGWU commenced a strike in November 1989 against the Escada New Jersey operation for alleged commission of unfair labor practices during an organizing campaign.

cess to the property, and the property's relative size and openness.'' *Jean Country*, supra.

Depending on the relationship between the property and the person asserting a protectable right in it, a property ''right'' really consists of varying bundles of rights. The owner of property generally has the power to alienate the property, to use it for his own purposes, and to exclude others from it. In all of these areas, however, the law impinges on each strand of right in particular ways. The owner cannot refuse to sell or rent his property for invidious reasons which the Government has deemed to be unacceptable, nor, if the site has a public character, can he choose to exclude certain legally protected classes from the common public enjoyment of it. The zoning board or the fine arts commission may bar the owner from building a restaurant on it, and the police may not allow him to operate a disorderly house.

Property ''rights,'' in short, are subject to constraints imposed by law. Those constraints may be the more easily imposed when, as was said of the open-air mall in *Jean Country,* supra, it ''has, and is intended to have, certain quasi-public characteristics.'' Such traits, the Board stated, ''tend to lessen the private nature of the property, because it is apparent that the public is extended a broad invitation to come on the property, and not necessarily with the specific purpose of purchasing a particular product or service.'' This is, of course, no less true of an enclosed mall.[5]

In *Jean Country*, the Board noted that, although the mall manager had testimonially referred to no-solicitation rules, no such rules had been placed in evidence. The Board said that it assumed that owners ''have rights in some degree to control access to the property during business hours and to control the public's conduct on the property,'' but it did not pursue the matter further because ''no pertinent regulations have been put before us.'' In the instant case, as noted, the security manual bars the ''distribution of written materials,''[6] although a tenants' manual does not contain similar language (the closest wording being a prohibition of ''canvassing, soliciting, or peddling''). While the rules in the security manual are supposed to be posted at all entrances, they have not been, as earlier noted.

It is somewhat difficult to understand how the ''strength'' of a property right is measured by judging the degree to which the property holder attempts to regulate use of the property. A tenant's property right would seem to have no more and no less ''strength'' by virtue of the tenant's decision to keep the public away or invite it in. The Board, however, has given substantial weight to the use to which the property is put, as seen above; perhaps it means, by referring to the ''strength'' of a property right, the intensity or necessity of the property holder's *desire* to exercise its power to exclude or invite strangers.

What weight the Board would assign to an unposted rule prohibiting the distribution of written materials is not clear. The primary purpose of such a rule would seem to be the maintenance of an unlittered shopping area, and the evidence shows that the handbillers in this case were instructed to pick up any leaflets thrown to the ground. Another purpose might be to avoid annoyance to customers, but, as *Jean Country* and its related cases show, prevention of such annoyance simply cannot, given the proper circumstances, be raised as a defense.[7]

In *Jean Country*, supra, the Board found (and it could hardly conclude otherwise) that ''strict maintenance of the privacy of the mall property during business hours is not an overriding concern and in fact is not generally desirable, because the presence of the public in large numbers is instrinsic to the commercial goals of the lessees and Respondent Brooks.'' It went on to decide that, for this reason, the private property right asserted against the picketing there is ''quite weak in the circumstances.'' Applying this rationale and comparing the circumstances, it is not easy to detect a distinction between picketing in front of a store in an open-air mall and handbilling in front of a store in an enclosed mall.

The ''strength'' of the right implicated in the handbilling derives from its placement on the ''spectrum'' of Section 7 rights. The Section 7 activity engaged in here could be considered to ''protest unfair labor practices,'' which, in *Jean Country*, the Board denominated as a ''central'' right, on a par with ''the right of employees to organize.'' Since the handbilling was directed against an outlet of Escada, the primary disputant, the Section 7 right being exercised would appear to be of the highest order. Even where handbilling is simply called ''struck product consumer handbilling,'' the Board has twice recently declared such activity to be the assertion of a ''relatively strong'' Section 7 right. *Mountain Country Food Store*, 292 NLRB 967 (1989); *Sentry Markets*, 296 NLRB 40 (1989).[8]

Given this precedent, it would follow that the scales tip in favor of the Section 7 right.[9]

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[5] See *Little & Co.*, 296 NLRB 691 (1989), which found economic strike picketing to be protected even though it was performed in the lobby of the 14th floor of a building in which an office of the primary disputant was located.

[6] The present distribution of handbills is not properly classified as ''solicitation'' under the clause in the security manual, since there the prohibited conduct is limited to importuning ''with respect to any request or demand for payment of money or subscription to any form of communication.'' R. Exh. 6, p. 2.

[7] Accordingly, I rejected certain studies which Galleria Marketing Manager Umstead purportedly had reviewed and which are said to show that ''solicitation has a negative impact on shoppers.'' The possibility that handbilling ''hurts sales,'' as counsel argued, is of no more consequence than the possibility that lawful picketing might adversely affect business. Moreover, handbilling limited to the Laurel store is likely to minimize any negative impact on other stores in the mall.

[8] In its affirmance of the latter case, *Sentry Markets v. NLRB*, 914 F.2d 113 (7th Cir. 1990), the court erred in stating that in *Montgomery Ward & Co.*, 265 NLRB 60 (1982), ''the Board held struck product consumer handbilling to be of the highest 'nature and strength.''' See ibid., Board decision, final paragraph.

[9] On brief, Respondents advance four special contentions to dilute the Sec. 7 right involved here; I reject them all.

The first argument—that the ''Escada dispute is remote to the Galleria''—is, economically, untrue. Escada leases space in the Galleria and sells its imported goods there under the store name ''Laurel.'' The Laurel store is thus closely involved in the dispute.

The second argument is that the leaflets deserve no protection because they contain untruths. The first ''untruth'' Respondents assert is that one handbill states, ''We Escada workers are on strike . . .,'' while in fact none of the handbillers were Escada employees. Whether such an untruth would be important is beside the point here, since the handbill is not, in fact, misleading—the handbillers did not purport to be Escada employees, but rather their agents; the handbill is signed by ''The Escada Workers' Strike Committee,''

Left for consideration is the question of whether reasonable alternative means were available to the Union to engage in its protected activity. Where the intended audience was the potential customers of the Laurel store, ''[t]he single alternative worthy of extended consideration in these circumstances is the possibility of the Union's communicating its message from public property at the entrances to the mall.'' *Jean Country*, supra at 18.[10] In concluding that such communication was not a reasonable alternative, the Board considered the dilution of the Union's message caused by the ''sheer physical distance'' from the mall entrances to the Jean Country store; the large number of other stores; and the crowds of people coming onto the property at eight different entrances.

Although the present facts are not as large in scale, a similar analysis produces a similar conclusion. While the distances from the mall entrances to the Laurel store are not as great as those in *Jean Country*, the same basic problems present themselves. Requiring the Union to convey its message from public property would entail the use of at least five handbillers at the different entrances. Shoppers who are proffered the handbills outside the mall are probably more likely to turn away from or to discard or disregard the message, especially in inclement weather, as compared to receiving them in the dry and climate—controlled arcade. ''Another consideration if the Union had to communicate its messages at the mall's entrances, given the circumstances of this case, is the chance that the Union might unintentionally enmesh neutral stores in its labor dispute with [Escada].'' Ibid. Moreover, as General Counsel points out, restricting the handbilling would possibly prevent any communication of the message to the many employees who work in the adjacent 40-story office building and who need not leave the property to enter the Galleria, and to those customers who enter through the parking garage.

As in *Jean Country*, a requirement of handbilling all potential customers in order to reach the desired few, and the possibility that the message may not as readily reach the desired few by public property handbilling as by store entrance handouts, together with the sensible desideratum of keeping the dispute as narrowly confined as possible, point to the conclusion that propagandizing from public property is not a reasonably effective alternative means of communication.

Here, like *Jean Country*, we are considering a venue devoted to public use, a characteristic which the board has referred to as rendering the property right ''quite weak'' and which considerably enervates claims based on privacy and disruption;[11] the exercise of a Section 7 right which the Board has labelled either ''central'' or ''relatively strong''; and a case fairly made that other means of communication are not nearly as effective as direct-store handbilling. Having weighed these results, there seems to be no alternative under the *Jean Country* principles and precedents to a conclusion that Respondents' refusal to allow the Union to continue handbilling at the Laurel store violated Section 8(a)(1) of the Act.

The remainder of the complaint refers to isolated instances in which the handbillers, after being ordered out of the Galleria, were allegedly required by security guards to refrain from handbilling on what the guards assumed to be private property. The guards, apparently in the mistaken belief that the entire brick path surrounding the Galleria was private property, assertedly required the union agents to remove themselves from what was actually public property.

While the good faith of the guards does not constitute a defense, it seems to me that the core of this case is the issue of handbilling inside the mall, and not whether the guards erred in knowing where the private/public demonstration line should be drawn. There seems to be no doubt that Respondent understands its obligation to refrain from interference with the Union's conduct on public property. I note that, on February 20, after the handbillers were ejected from the mall and took up positions outside, the Union and management, using a property map, calculated where the Galleria border ended and the public access area started outside of the main entrance. That particular confusion has now been clarified. In these circumstances, since the question as to whether the

which is obviously the group that ''We Escada workers . . .'' refers to.

Third, Respondents point to the fact that the other handbill states that the strike ''has successfully shut down Escada's U.S. importing operation.'' But the fact on which Respondents rely for this argument—a stipulation that the strike ''did not completely shut down Escada's import operations''—is a far cry from definitively giving the lie to the handbill claim. In any event, the substantive value of the contention seems to be of little moment.

Finally, Respondents, citing *Hardee's Food Systems*, 294 NLRB 642, (1989), enfd. sub nom. *Laborers' Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990), argue that there were many other sites at which the Union could have handbilled. But *Hardee's* is factually different because there the union's effort was to handbill the locations of secondary employers substantial distances away from the primary situs of the primary employer. Moreover, the record shows no other locations at which Escada and Laurel brands are sold exclusively at a store leased by Escada; the evidence refers only to a few Ohio stores which carry the Escada line, and gives no information as to the physical characteristics of these sites.

[10] At the cited page, fn. 18, the Board stated that it would be ''an exceptional case'' where use of the mass media should be considered a reasonable alternative.

[11] A unique, and telling, factor here is that the Respondents authorized the Union to handbill at the Laurel store entrance for 25 days before ordering the handbilling to stop. No reason was given at the hearing to explain the change of heart other than testimony by an attorney for GJV that he was advised by his client that the handbilling ''did interfere with the operations of the mall.'' The record indicates that the handbilling had caused no incident or problem serious enough to be memorialized in an incident report or other record.

I do not find the other occasions noted by the General Counsel to be substantial enough to affect the fundamental character of the property right here or to warrant a charge of disparate treatment. While the Salvation Army does engage in ''solicitation,'' it also likely does provide, in Respondents' view, a positive contribution to the Galleria's image, holiday ambience, and, ultimately, financial return, much like Christmas decorations. See *Sentry Markets*, supra. The same may be said of the permission to allow solicitation for South Carolina hurricane victims; it should be remembered that Marketing Manager Umstead testified, without contradiction, that she has consistently refused to allow Respondents' own tenants to pass out flyers. It was undoubtedly the wiser course of action to stand by in silence while the college-professor demonstration lived out its short life (Respondents contend that the testimony shows that the demonstration occurred off the mall property; I read the record otherwise). Finally, the art and auto displays did not involve the presence of strangers, and thus differed in an important respect from regular solicitation or handbilling.

Union was entitled to hand out pamphlets inside the mall has also (at this stage, anyhow) been resolved, no statutory purpose would be furthered by inquiring into whether Respondents' agents made isolated errors in distinguishing between what constituted public and private property outside the shopping center.

CONCLUSIONS OF LAW

1. Each of the Respondents is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring that union handbillers cease from engaging, in front of the Laurel store in the Galleria, in activity protected under Section 7 of the Act, Respondents violated Section 8(a)(1) of the Act.

THE REMEDY

As a remedy, I recommend that Respondents be ordered to cease and desist from engaging in the unfair labor practice found and to take certain affirmative action which will effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondents, Galleria Joint Venture and St. Clair Management Co., Cleveland, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of the Union from distributing handbills within the Galleria mall in circumstances in which Section 7 of the Act protects such activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Galleria mall, Cleveland, Ohio, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representatives, shall be posted by them immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from receipt of this Order what steps the Respondents have taken to comply.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''